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LEGAL FRAMEWORK OF THE LAW OF WAR

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REFERENCES:

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362. (GWS)
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, T.I.A.S. 3363. (GWS Sea)
3. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364. (GPW)
4. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949 T.I.A.S. 3365. (GC)
5. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, *reprinted in* 16 I.L.M. 1391, DEP'T OF ARMY, PAMPHLET 27-1-1 (GP I & II).
6. Commentary on the Geneva Conventions, (Pictet ed. 1960).
7. DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE, (7 Dec. 1956).
8. DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS of 12 August 1949 (1 Sept. 1979).
9. DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (23 Oct. 1962).
10. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956).
11. NAVAL WARFARE PUBLICATION 1-14/MCWP 5-2.1/COMDTPUB 5800.7 THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Oct. 1995).[(FORMERLY NWP 9/FMFM 1-10 (REVISION A),
12. AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW - THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (19 Nov. 1976).
13. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE (1959).
14. DIETRICH SCHINDLER & JIRI TOMAN, THE LAW OF ARMED CONFLICT (1988).
15. HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW, (1990).
16. HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, (1986).

I. OBJECTIVES.

- A. Become familiar with the primary sources of the law of war.
- B. Become familiar with the “language” of the law.

- C. Understand how the law of war is “triggered.”
- D. Become familiar with the role of the 1977 Protocols to the Geneva Conventions of 1949.
- E. Be able to distinguish “humanitarian” law from human rights law.

II. THE LANGUAGE OF THE LAW. THE FIRST STEP IN UNDERSTANDING THE LAW OF WAR IS TO UNDERSTAND THE “LANGUAGE” OF THE LAW. THIS REFERS TO UNDERSTANDING SEVERAL KEY TERMS AND CONCEPTS THAT ARE WOVEN THROUGH THIS BODY OF LAW.

- A. Sources of Law.
 - 1. Customary International Law. This can be best understood as the “unwritten” rules that bind **all** members of the community of nations. Many principles of the law of war fall into this category of international law.
 - 2. Conventional International Law. This term refers to codified rules binding on nations based on express consent. The term “treaty” best captures this concept, **although other terms are used to refer to these: Convention, Protocol, and Attached Regulations.**
 - a. Norms of customary international law can either be codified by subsequent treaties, or emerge out of new rules created in treaties.
 - b. Many law of war principles are both reflected in treaties, and considered customary international law. **The significance is that once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.**

- B. The “Big Three.” While there are numerous law of war treaties in force today, the “three” that provide the vast majority of regulation are: the **Hague Convention of 1907 (and Annexed Regulations), the Four Geneva Conventions of 1949, and the 1977 Protocols to the 1949 Geneva Conventions.**
1. **The Targeting Method.** This prong of the law of war is focussed on regulating the **methods and means** of warfare, *i.e.* tactics, weapons, and targeting decisions.
 - a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899 as revised in 1907, plus the 1954 Hague Cultural Property Convention and the 1980 Conventional Weapons Convention.
 2. **The Protect and Respect Method.** This prong of the law of war is focussed on establishing non-derogable protections for the “victims of war.”
 - a. This method is exemplified by the 4 Geneva Conventions of 1949. Each of these four “treaties” is devoted to protecting a specific category of war victims:
 - (1) GW: Wounded and Sick in the Field.
 - (2) GWS: Wounded, Sick, and shipwrecked at Sea.
 - (3) GP: Prisoners of War.
 - (4) GC: Civilians.
 - b. The Geneva Conventions entered into force on 21 October 1950. The President transmitted the Conventions to the United States Senate on 26 April 1951. The United States Senate gave its advice and consent to the Geneva Conventions on 2 August 1955.

3. The “Intersection.” In 1977, two treaties were created to “supplement” the 1949 Geneva Conventions. These treaties are called the 1977 Protocols (I & II).
 - a. While the purpose of these “treaties” was to supplement the Geneva Conventions, they in fact represent a mix of both the Respect and Protect method, and the Targeting method.
 - b. Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols.

C. Key Terms.

1. Part, Section, Article . . . Treaties, like any other “legislation,” are broken into sub-parts. In most cases, the **Article** represents the specific substantive provision.
2. “Common Article.” This is a critical term used in the law of war. It refers to a finite number of articles that **are identical in all four of the 1949 Geneva Conventions**. Normally these related to the scope of application and parties obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same, but numbered differently in various conventions. For example, the article dealing with special agreements is article 6 of the first three conventions, but article 7 of the Fourth Convention.
3. Treaty Commentaries. These are works by official recorders to the drafting conventions for these major law of war treaties (Jean Pictet for the 1949 Geneva Conventions). These “Commentaries” provide critical explanations to many treaty provisions, and are therefore similar to “legislative history” in the domestic context.

D. Army Publications. There are three primary Army sources that reflect the rules that flow from “the big three:”

1. FM 27-10: The Law of Land Warfare. This is the “MCM” for the law of war. It is organized functionally based on issues, and incorporates rules from multiple sources.

2. DA Pam 27-1. This is a verbatim reprint of The Hague and Geneva Conventions.
3. DA Pam 27-1-1. This is a verbatim reprint of the 1977 Protocols to the Geneva Conventions.

III. HOW THE LAW OF WAR IS TRIGGERED.

- A. The Barrier of Sovereignty. Whenever international law operates to regulate the conduct of a state, it must “pierce” the shield of sovereignty.
 1. Normally, the concept of sovereignty protects a state from “outside interference with internal affairs.” This is exemplified by the predominant role of domestic law in internal affairs.
 2. However, in some circumstances, international law “pierces the shield of sovereignty, and displaces domestic law from its exclusive control over issues. The law of war is therefore applicable **only after the requirements for piercing the shield of sovereignty have been satisfied.**
 3. The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict.
 - a. Once triggered, it therefore intrudes upon the sovereignty of the regulated state.
 - b. The extent of this “intrusion” will be contingent upon the nature of the conflict.
- B. The Triggering Mechanism. The law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.

1. Common Article 2 -- International Armed Conflict: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. "

a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. According to the Commentary, the law of war applies to: "**any difference arising between two States and leading to the intervention of armed forces.**"

b. Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict.¹ The following two facts result in application of **the entire body of the law of war:**

(1) A dispute **between states, and**

(2) **Armed conflict** (see FM 27-10, paras. 8 & 9).

(a) De facto hostilities are what are required. The drafters deliberately avoided the legalistic term war in favor of the broader principle of armed conflict. According to Pictet, this article was intended to be broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.

c. Exception to the "state" requirement: Conflict between a state and a rebel movement recognized as belligerency.

(1) Concept arose as the result of the need to apply the Laws of War to situations in which rebel forces had the de facto ability to wage war.

¹ HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 11 (1986). See also Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 97 (1988).

- (2) Traditional Requirements:
 - (a) Widespread hostilities - civil war.
 - (b) Rebels have control of territory and population.
 - (c) Rebels have de facto government.
 - (d) Rebel military operations are conducted under responsible authority and observe the Law of War.
 - (e) Recognition by the parent state or another nation.
- (3) Recognition of a belligerent triggers the application of the Law of War, including The Hague and Geneva Conventions. The practice of belligerent recognition is in decline in this century. Since 1945, full diplomatic recognition is generally extended either at the beginning of the struggle or after it is successful (EX: The 1997 recognition of Mr. Kabila in Zaire).

d. Controversial expansion of Article 2 -- Protocol I Additional (1977).

- (1) Expands Geneva Conventions application to conflicts previously considered internal ones: "[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Art 1(4), GPI.

- (2) U.S. has not yet ratified this convention because of objections to article 1(4) and other articles. The draft of Protocol I submitted by the International Committee of the Red Cross to the 1974 Diplomatic Conference did not include the expansive application provisions.

e. Termination of Application (Article 5, GWS and GPW; Article 6, GC).

- (1) Final repatriation (GWS, GPW).
- (2) General close of military operations (GC).
- (3) Occupation (GC) -- The GC applies for one year after the general close of military operations. In situations where the Occupying Power still exercises governmental functions, however, that Power is bound to apply for the duration of the occupation certain key provisions of the GC.

2. **The Conflict Classification Prong of Common Article 3 --** Conflicts which are not of an international character: "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . ."

- a. These types of conflicts make up the vast bulk of the ongoing conflicts.
- b. Providing for the interjection of international regulation into a purely internal conflict was considered a monumental achievement for international law in 1949. **But, the internal nature of these conflicts explains the limited scope of international regulation.**
 - (1) Domestic law still applies - guerrillas do not receive immunity for their war-like acts, as would such actions if committed during an international armed conflict.

- (2) Lack of effect on legal status of the parties. This is an essential clause without which there would be no provisions applicable to internal armed conflicts within the Conventions. Despite the clear language, states have been reluctant to apply Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.
- c. What is an “internal Armed Conflict?” Although no objective set of criteria exist for determining the existence of a non-international armed conflict, Pictet lists several suggested criteria:
 - (1) The rebel group has an organized military force under responsible command, operates within a determinate territory, and has the means to respect the Geneva Conventions.
 - (2) The legal Government is obliged to have recourse to the regular military forces against the rebels, who are organized and in control of a portion of the national territory.
- d. Protocol II, which was intended to supplement the substantive provisions of Common Article 3, formalized the criteria for the application of that convention to a non-international armed conflict.
 - (1) Under responsible command.
 - (2) Exercising control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

C. What is the Relationship with Human Rights?

- 1. Human Rights Law refers to a totally distinct body of international law, intended to protect individuals from the arbitrary or cruel treatment of governments **at all times**.

2. While the **substance** of human rights protections may be synonymous with certain law of war protections, **it is critical to remember these are two distinct bodies of international law. The law of war is triggered by conflict. No such trigger is required for human rights law.**
 - a. These two bodies of international law are easily confused, especially because of the use of the term “humanitarian law” to describe certain portions of the law of war.

D. How do the Protocols fit in?

1. As indicated, the 1977 Protocols to the Geneva Conventions of 1949 are supplementary treaties. Protocol I is intended to supplement the law of war related to international armed conflict, while Protocol II is intended to supplement the law of war related to internal armed conflict. Therefore:
 - a. When you think of the law related to international armed conflict, also think of Protocol I;
 - b. When you think of the law related to internal armed conflict, also think of Protocol II.
2. Although the U.S. has never ratified either of these Protocols, there relevance continues to grow based on several factors:
 - a. The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law.
 - b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.
 - c. These treaties bind virtually all of our coalition partners.
 - d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

IV. OTHER KEY LAW OF WAR CONCEPTS.

- A. Protected Person. This is a legal “term of art” under the law of war. It refers to an individual vested with the maximum benefit under a given Geneva Convention. Each Convention defines which individuals fall within this category.
- B. Protecting Power. This refers to an agreed upon neutral state responsible for monitoring compliance with the Geneva Conventions and Protocols. Such agreements are rarely reached.
- C. Combatant Immunity. Perhaps the greatest benefit granted to combatants by the law of war, it refers to the immunity afforded by international law for warlike acts committed during international armed conflict. There are two critical caveats:
 - 1. This immunity is not “absolute.” It extends only to acts that are consistent with the law of war. Therefore, a combatant who violates the law of war receives no immunity for that conduct.
 - 2. Combatant Immunity applies **only to international armed conflict**. The inability of international law to extend combatant immunity into internal armed conflicts is perhaps the greatest manifestation of the limited scope of law of war regulation during internal conflicts.
- D. Reprisal. “[A]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.” [Para. 497, FM 27-10]
 - 1. The concept of reprisal is considered the one true “self-help” mechanism built into the law of war.
 - 2. The right of reprisal has been severely restricted by Protocol I. This was a major motivation behind the U.S. decision not to ratify this treaty.

- E. War Crime. While war “legalizes” many acts that would be unlawful in peacetime, it does not “legalize” everything unlawful in peacetime. War is not a license to kill, but a limited authorization to kill. War crimes are simply those acts that are unlawful in peacetime, and remain unlawful in wartime.
- F. Special Agreements. These are agreements the parties concluded during actual hostilities. The drafters of the Conventions recognized that they could not envision every circumstance that would arise regarding POWs, wounded and sick, and civilians. Thus, they sanctioned the use of special agreements.
- G. Grave Breaches of the Geneva Conventions: violations of the law of war involving any of the following acts, if committed against persons or property **protected by the Conventions**: willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a POW or protected civilian to serve in the armed force of a hostile power, depriving a POW or protected civilian of the rights of fair or regular trial as prescribed in the Conventions, unlawful deportation or transfer or unlawful confinement of a protected civilian, taking hostages.
- H. Respect for the Conventions (Common Article 1). Establishment of the basic obligation of signatories of the Geneva Conventions to implement the provisions. The term "respect" was intended to emphasize the humanitarian and unilateral nature of the obligation undertaken by Parties to the Conventions to comply with its provisions.
 - 1. The drafters intended "ensure respect for" to advise the Parties of their continuing obligation to oversee the effective implementation of the Conventions. The term has also been interpreted in the Commentary to include an obligation on the Parties to see that other Parties are complying with the Conventions.²

² In May 1983, the ICRC appealed to the Parties to the Geneva Conventions to bring influence to bear on both Iran and Iraq to better comply with the Law of War during their ongoing conflict. GEOFFREY BEST, LAW AND WAR SINCE 1945 146 (1994).